No. 87-12

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In the Supreme Court of the United States

OCTOBER TERM, 1987

EASTERN CONNECTICUT HEALTH SERVICES, INC.
D/B/A NEW LONDON CONVALESCENT HOME, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board erred in finding that the lack of participation on the part of petitioner's employees in a change of affiliation decision by the national union with which their collective bargaining agent was affiliated did not relieve petitioner of its duty to bargain.

2. Whether the NLRB erred in finding that the instances of union misconduct alleged by petitioner were not a sufficient basis for revoking the union's certification.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A26-A31) is reported at 815 F.2d 517. The decision and order of the National Labor Relations Board (Pet. App. A10-A13), and the decision of the administrative law judge (Pet. App. A14-A25), are reported at 281 N.L.R.B. No. 120. A prior decision of the National Labor Relations Board (Pet. App. A4-A9) is reported at 274 N.L.R.B. 1442.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1987. A timely petition for rehearing was denied on May 15, 1987 (Pet. App. A32). The petition for a writ of certiorari was filed on June 30, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In August 1983, the employees in a stipulated unit of service and maintenance workers at the New London Convalescent Home (New London) elected, by a vote of 66 to 42, the New England Health Care Employees Union, District 1199 (New England District 1199), as their exclusive bargaining representative (Pet. App. A5). New London, however, filed objections with the National Labor Relations Board, alleging that the New England District 1199 had engaged in unlawful pre-election conduct (*id.* at A1-A2). While New London's objections were pending, petitioner Eastern Connecticut Health Services, Inc., purchased New London's assets, property, and business and assumed complete responsibility for providing health care services at that location (*id.* at A6).[1] Approximately three months later, on June 14, 1984, the Board determined that New London's objections were meritless and certified New England District 1199 as the exclusive bargaining representative of the service and maintenance workers at the New London facility (*id.* at A1-A2). But petitioner refused to bargain with New England District 1199 (*id.* at A6).

Accordingly, the General Counsel issued a complaint alleging that petitioner had violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5) and 158(a)(1), by refusing to bargain in good faith with New England District 1199 (Pet. App. A4-A5). On the General Counsel's motion for summary judgment, the Board held that petitioner was a "successor employer" at the New London facility and therefore had a duty to recognize and bargain with New England District

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[1] Petitioner continued conducting business at the same location, provided the same health care services, and employed at least a majority of the persons previously employed by New London (Pet. App. A6-A7).

1199 (*id.* at A6-A7). In addition, it rejected petitioner's contention that New England District 1199 had engaged in egregious misconduct sufficient to require revocation of its certification or, when combined with alleged employee turnover and the change in ownership, sufficient to rebut the presumption of continued majority support (*id.* at A7). But, citing *Amoco Production Co.*, 262 N.L.R.B. 1240 (1982), aff'd, 721 F.2d 150 (5th Cir. 1983) *(Amoco IV)* (employer not required to bargain with a newly affiliated union that has not permitted non-union members of unit to participate in a change of affiliation decision), the Board agreed with petitioner that material issues of fact existed concerning whether bargaining unit members had been improperly denied participation in New England District 1199's post-certification selection of a new national union affiliate (Pet. App. A7-A8). It therefore ordered that an evidentiary hearing be conducted with respect to this issue (*id.* at A8).

2. The following facts were then adduced: When the representation election was conducted in August 1983, New England District 1199 was one of eleven unions affiliated with the National Union of Hospital and Health Care Employees (the National Union), which in turn was affiliated with the Retail, Wholesale and Department Store Union, AFL-CIO (RWDSU) (Pet. App. A16). On June 6, 1984, prior to New England District 1199's certification at the New London facility, the executive board of the National Union, which included representatives of New England District 1199, voted to disaffiliate from RWDSU, effective October 1, 1984, and to accept an independent charter from the AFL-CIO, effective the same date (*id.* at A17, A20).[2] Neither members of the National

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[2] The disaffiliation was the culmination of a dispute between the National Union and the RWDSU that began in 1982 when the RWDSU revoked the right of its affiliates to secede without its

Union nor members or non-members represented by its affiliates, including New England District 1199, were allowed to vote on the disaffiliation decision (*id.* at A16). On July 13, 1984, however, the National Union notified its district affiliates that it would conduct a membership referendum with respect to its reaffiliation with the AFL-CIO and, on July 31, 1984, mailed such referendum ballots to the 60,000 members who, as of April 30, 1984, were in good standing with the National Union (*id.* at A17, A19). The maintenance and service workers at the New London facility were not officially represented by New England District 1199 on April 30, 1984 and, although membership had been available to them prior to this time, none were eligible to vote in the July 1984 membership referendum (*ibid.*; JX 21, Art. 6).[3] A majority of the members who were eligible to cast votes approved the National Union's acceptance of an independent AFL-CIO charter (*ibid.*).

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approval (Pet. App. A16). In December 1983, the elected delegates to the National Union's convention voted to authorize the National Union's executive board to disaffiliate from the RWDSU (*ibid.*). Litigation followed, resulting in a May 3, 1984, court-approved settlement that permitted the National Union to disaffiliate and that required the RWDSU to support the National Union's request for an independent charter from the AFL-CIO (*id.* at A17). The AFL-CIO offered the National Union such an independent charter on May 7, 1984 (*ibid.*).

[3] Although the parties stipulated, and the NLRB found, that a "substantial number" of petitioner's employees were not members in good standing on April 30, 1984 (J.A. 21; Pet. App. A17), petitioner correctly notes that none of its employees were members of the union by that date (Pet. 12; J.A. 48, 49). Contrary to petitioner's statement (Pet. 14), however, those employees were free before April 30, 1984 to acquire membership in New England District 1199 and to participate in union affairs (JX 21, Art. 6). A substantial number of employees represented by New England District 1199 in other bargaining units were so eligible and did vote in the July 1984 referendum (J.A. 328).

3. The Board, adopting the findings and conclusions of an administrative law judge (ALJ), then held that the change in affiliation raised no question concerning representation and that, on request, petitioner had to bargain with New England District 1199 (Pet. App. A10-A25). Initially, it noted that this Court, in *NLRB* v. *Financial Institution Employees, Local 1182,* No. 84-1493 (Feb. 26, 1986) (*Sea-First*), rejected the rule established in *Amoco IV, i.e.,* that an employer cannot refuse to bargain with a union that has not allowed nonmember employees to vote on an affiliation decision (Pet. App. A18). The Board therefore rejected petitioner's contention that the refusal to bargain was justified by the simple lack of participation that its employees had had with respect to the union's decision to disaffiliate with RWDSU and to reaffiliate with the AFL-CIO (*ibid.*). And it further determined that, while this Court in *Sea-First* indicated that a new representation election may be conducted wherever a change in affiliation raises a question of representation (*ibid.*), the affiliation decision in this case did not raise a substantial representation question (*id.* at A18-A21); the Board found that "due process was observed" in the disaffiliation/affiliation process (*id.* at A18-A19),[4] that there was "more than 'substantial continuity' between the pre- and post-disaffiliation union" (*id.* at A19), and that the change in the National Union's affiliation had no impact on "the certified representative of * * * [petitioner's]

[4] Adopting the ALJ's findings, the Board noted (Pet. App. A19) that "the disaffiliation of the National from RWDSU was approved by duly elected officers of the National and delegates from the Districts," that the disaffiliation "agreement was approved by the United States District Court, thereby providing judicial guidance for the process," and that "a referendum by mail ballot was conducted in which the members approved the direct affiliation to AFL-CIO."

employees"—*i.e.*, New England District 1199 (*id.* at A21).[5]

4. In a per curiam opinion, the court of appeals upheld the Board's decision and enforced its order (Pet. App. A26-A31). The court noted that, "[u]nder the standards set forth" in *Sea-First*, a new election may be required only if the Board finds "that the union's new affiliation 'substantially change[d] a certified union's relationship with the employees it represents' " and, even then, only if " 'it is unclear whether a majority of employees continue to support the recognized union' " (*id.* at A28 (citation omitted)). It then said that "the Board's detailed findings of fact * * * amply warrant its conclusion that the first part of this test had not been met here" (*ibid.*). And it added that, "[i]n any event, the facts alleged by the employer do not suffice to raise a substantial question as to the second part of the test" (*id.* at A28-A29), noting that "[a] union may properly limit voting on [organizational change] questions to its members," that "the fact that this may disenfranchise some of the employees in the bargaining unit is of no consequence; those employees were free to join the union if they wished to participate in its internal

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[5] Specifically, adopting the ALJ's findings, the Board noted (Pet. App. A19-A20) that, following the change in affiliation, New England District 1199 remained one of several geographic districts of the National Union, that there was no change in its jurisdiction, its procedures for organizing employees, its methods of collective bargaining and contract negotiation, or its method of electing officers, and that the officers and staff of both New England District 1199 and the National Union continued to serve in their pre-affiliation capacities. Indeed, it found that, before the change in affiliation, the RWDSU had served the National Union principally as an indirect connection to the AFL-CIO and that, after the change, the National Union simply had a direct connection to the AFL-CIO by virtue of its independent charter, so that, as far as the certified union was concerned, the change in national union affiliation was only "cosmetic" (*id.* at A20).

affairs" (*id.* at A29), and that "the record supports the finding of the Board that the union affirmatively sought to insure that all eligible workers wishing to vote had the opportunity to do so" (*ibid.*).

The court also rejected petitioner's claim that certain alleged instances of "union misconduct" were sufficient "to rebut the ordinary presumption that a union retains majority support for a year following certification" (Pet. App. A29). It reasoned that "the Board is entitled to view such claims with skepticism when made by employers rather than [by] employees," and that "the instances of misconduct alleged by the employer—the brief occupation of an administrative office, and a single instance of assertedly illegal picketing—do not rise to the level of egregiousness which would warrant us in concluding that the Board abused its discretion in requiring the employer to bargain with union" (*id.* at A29-A30).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. In *Sea-First,* this Court held that "the Board exceeded its authority under the Act in requiring that non-union employees be allowed to vote for affiliation before it would order the employer to bargain with the [newly] affiliated union" (slip op. 16). The Court stated that "[u]nder the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation raises a question of representation and if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit" (*id.* at 9). The Court acknowledged that, "as is the case with any organizational

[or] structural change, a new affilation may substantially change a certified union's relationship with the employees it represents" and that "[t]hese changed circumstances may in turn raise a 'question of representation' " (*ibid.*). But it also said that, "[i]n many cases, a majority of employees will continue to support the union despite any change precipitated by affiliation" (*id.* at 10 (footnote omitted)), that, "[i]n such situations, affiliation does not necessarily implicate the 'selection' of a new bargaining representative," and that, in these cases, the union "retains a legitimate interest in continuing to bargain collectively with the employer" (*id.* at 10). The Court concluded that "[t]he Act balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question of representation" (*ibid.* (emphasis in original))[6] and that otherwise "the Act gives the Board no authority to require unions to follow [any specific] procedures in adopting organizational changes" (*id.* at 11 (footnote omitted)).[7]

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[6] The Court in *Sea-First* noted with apparent approval (slip. op. 6-7, 9-10, 13-14, 16 n.13) that the Board has held that organizational changes which are substantial enough to create an entirely different entity may raise a question of representation. In such situations, the Board determines whether a question of representation exists by examining such factors as whether the union continues to administer the contracts to which it is a party, whether it has retained its old officers, and whether it has maintained its autonomy with respect to contract negotiations, strikes, and grievances. See *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961, 966 (1st Cir. 1986).

[7] The NLRB has traditionally required affiliation decisions to be conducted with adequate "due process" safeguards, including notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy. See, *e.g.*, *Newspapers, Inc.*, 210 N.L.R.B. 8, 9 (1974), enforced, 515 F.2d 334 (5th Cir. 1975). The Court in *Sea-First* said that it "need not assess" the Board's statutory authority to impose these requirements. See slip op. 6 n.6.

The decision below follows straightforwardly from the decision in *Sea-First*. The court found substantial evidence to support the Board's finding that the national union's new affiliation did not substantially change New England District 1199's relationship with the service and maintenance workers at the New London facility (Pet. App. A28). The court also found substantial evidence to support the Board's finding that no question of representation—*i.e.*, a question whether the majority of the employees in the unit continued to support the union—was raised by the facts presented in this case (*id.* at A28-A29). And, finally, the court found that "the record supports the finding of the Board that the union affirmatively sought to insure that all eligible workers wishing to vote had the opportunity to do so" (*id.* at A29). In these circumstances, the decision in *Sea-First* required the court below (and the Board) to reject petitioner's claim that the lack of participation by the service and maintenance workers at the New London facility in the national union affiliation decision justified its refusal to bargain.

2. Petitioner simply errs in suggesting (Pet. 12-18) that the decision below conflicts with decisions holding that all employees in the bargaining unit must approve or disapprove any organizational change. First of all, as petitioner apparently concedes (Pet. 13), *Sea-First* explicitly holds that, absent a question of representation, a union may properly limit voting on organizational changes to its members. Second, contrary to petitioner's representation (Pet. 12, 13), the retroactive eligibility date in this case did not preclude any employee in the bargaining unit from participating in the July 1984 referendum election; the Board conducted the representation election at the New London facility approximately eight months before the April 30, 1984 eligibility cut-off date, and employees in the bargaining unit were free throughout that eight-month period to join the Union and to participate in internal

union affairs (Pet. App. A29; JX 21, Art. 6).[8] Finally, no decision of any court or of the Board holds, as petitioner asserts (Pet. 15-17), that at least some union members in a bargaining unit represented by a union (such as New England District 1199) that represents a number of separate bargaining units must participate in an election concerning a proposed organizational change; in fact, the case law is to the contrary. See *Providence Medical Center*, 243 N.L.R.B. 714, 723 (1979); *Montgomery Ward & Co.*, 188 N.L.R.B. 551 (1971). The cases cited in the petition simply do not support the proposition for which they are advanced.[9]

3. Petitioner further errs in suggesting (Pet. 18-19) that "changed circumstances" required the Board to conduct an election to determine whether New England

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[8] There is no foundation for petitioner's suggestion (Pet. 14-15) that the April 30, 1984 eligibility date was manipulated to foreclose participation either by petitioner's employees or by nonmembers in other bargaining units represented by the consolidated local.

[9] In *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961 (1st Cir. 1986), the issue was whether the informal voting procedures used in the particular circumstances at issue there satisfied the NLRB's "due process" requirements; all of the unit employees belonged to the union and there was no issue raised concerning whether any bargaining unit employee had been denied the right to vote. In *Rinker Materials Corp.*, 162 N.L.R.B. 1688, 1689 (1967), *Carriage Oldsmobile Cadillac, Inc.*, 210 N.L.R.B. 620, 621 (1974), and *1820 Central Park Ave. Restaurant Corp.*, 271 N.L.R.B. 378 (1984), all of which were decided prior to this Court's decision in *Sea-First*, none of the unit employees—union member or nonmember—were allowed to participate in the organizational change procedure. And in *Yale Manufacturing Co.*, 157 N.L.R.B. 597, 598 (1966), which was also decided prior to the decision in *Sea-First*, none of the disenfranchised employees had been permitted to join the union prior to the election. Of course, to the extent *Yale Manufacturing Co.* proscribed a procedure that barred only nonmembers from voting on an organizational change issue, it has been superseded by the decision in *Sea-First*.

District 1199 continued to enjoy majority support of the service and maintenance employees at the New London facility. To be sure, the Court in *Sea-First* stated that, where a new affiliation changes the union's relationship with unit employees, a representation election is appropriate if it is unclear whether a majority of the employees in the unit continue to support the union (slip op. 9-10). Here, however, the Board found that the affiliation decision did not change New England District 1199's relationship with the unit employees or create a question whether the union continued to enjoy majority support of the unit employees. These findings, which the court below upheld, are supported by substantial evidence and do not merit this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[10]

4. Finally, petitioner errs in contending (Pet. 19-22) that certiorari is required to make clear that the Board may question the representation status of a union where that union engages in "egregious misconduct" during a post-certification year. The Board did not suggest that it is without authority to question the representation status of a union engaging in "egregious misconduct." It merely

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[10] There is no merit to petitioner's assertions (Pet. 19) that its refusal to bargain was justified by "a petition from a vast majority of its unit employees disavowing representation" and the fact that this is a "successorship situation." To begin with, the petition to which petitioner refers was not admitted into evidence at the hearing conducted by the administrative law judge (see J.A. iv); thus, there is no assurance that the signatures on the petition are authentic. Moreover, the signatures on the petition are dated June 26-June 30, 1984 (J.A. 270-271); thus, even if bona fide, the document cannot justify petitioner's earlier refusal, on June 22, 1984, to bargain with the union. Finally, this Court has recently confirmed that the presumption of continuing majority status has particular justification in a successorship situation, because of the "unsettling transition period" following a change in ownership. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 11.

held that New England District 1199 had not engaged in any such "egregious misconduct." This fact-based determination, upheld by the court below, does not merit review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. at 490-491.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
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LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

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[11] In *NLRB* v. *Union Nacional de Trabajadores*, 540 F.2d 1 (1st Cir. 1976), cert. denied, 429 U.S. 1039 (1977), the NLRB refused to issue a bargaining order and revoked the certification of newly certified union that had engaged in threatening and violent behavior toward management and represented employees. Here, the allegation was only that an administrative office had been briefly occupied and that arguably illegal picketing had occurred. There was no evidence of violence, physical harm or threats thereof, or the filing by petitioner of any unfair labor practice or criminal charges.

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